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IN THE
Supreme Court of the United States
October Term, 1992

LUTHER R. CAMPBELL A/K/A LUKE SKYYWALKER, CHRISTOPHER WONGWON A/K/A FRESH KID ICE, MARK ROSS A/K/A BROTHER MARQUIS, DAVID HOBBS A/K/A MR. MIXX; PROFESSIONALLY KNOWN AS THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of *Amici Curiae* Concerned Law Professors Robert C. Berry, Ralph S. Brown, Amy B. Cohen, Dean M. Hashimoto, Peter Jaszi, Beryl R. Jones, David Lange, L. Ray Patterson, Pamela Samuelson, David J. Seipp and Alfred C. Yen in Support of Petitioners

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On writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STATEMENT OF INTEREST

Amici curiae, an *ad hoc* association of law professors,[1] have an interest in this case as citizens of the United States of America and scholars who actively study and teach the law of copyright. As citizens, we watch with concern as growing numbers of copyright owners use copyright to suppress opinions or artistic expression which they find distasteful.[2] Although these suits are not uniformly successful, their occasional success leaves a palpable chill upon others interested in similar forms of expression. The risk and expense of being sued, let alone the danger of an unfavorable judgment, forces potential authors into the unenviable choice of expressing themselves in a way which appeases the copyright holder or not expressing themselves at all. In either case, the public suffers serious harm, for neither censored nor unpublished expression serves a robust free marketplace of ideas so essential to the

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[1] All *amici* are either full time law professors or professors *emeriti*. Their academic affiliations are listed at the end of this brief. These affiliations are provided for the Court's information only. *Amici* file this brief in their capacity as individuals, and not as legal representatives of their respective law schools.

[2] A prominent recent example of this phenomenon is the dispute between Sut Jhally, a professor of communications at the University of Massachusetts, and the cable television network MTV. Professor Jhally made a video entitled "Dreamworlds: Desire/Sex/Power in Rock Video." The video analyzed 165 clips from music videos to conclude that women are generally portrayed as sex objects or nymphomaniacs. Professor Jhally then offered the video for sale, with all proceeds going to a university trust fund which benefitted the communications department. MTV was not amused and threatened Jhally with a copyright suit. *A Professor's Class Video Runs Into an MTV Protest*, New York Times, May 18, 1991, §1, at 46.

health of our society. Of course, potential authors lose as well, for the existence of private censorship implies a loss of precious individual rights of free speech.

As legal scholars, *amici* are particularly familiar with the peculiar interpretation of copyright law which makes the foregoing suppression of speech possible. This interpretation begins with a failure to heed the basic policies behind copyright law and the First Amendment, and it leads some courts to apply a wooden, remorseless presumption against commercial fair uses. With all due respect to those courts, it is fair to state that this presumption has become one of the most troubling developments in modern copyright law, for it wrongly chills the creation of many valuable works such as biographies, social commentary, and news reports. All of these extremely important works are generally created for commercial purposes. Yet, under the presumption, their existence often depends on the approval of some other person - a copyright holder. In our view, these works are far too important to have their continued viability depend on that approval. *Amici* have therefore filed this brief to point out undesirable ramifications of the presumption against fair commercial uses, especially in the case of parody.[3] It is our sincere hope that the Court will find our analysis helpful.

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[3] *Amici* have received written permission from both parties to file this brief under rule 37.3 of the Rules of the United States Supreme Court. The original letters of permission are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision is based on an improperly rigid presumption against the fair use treatment of any commercial use. Although the commercial nature of a use is important in any fair use analysis, the universal presumption applied by the Sixth Circuit seriously impairs copyright's ability to promote socially valuable expression. In the context of parody, copyright holders generally have no interest in selling rights to parodists nor exploiting the market for parodies themselves. Indeed, copyright holders often have the desire to suppress the production of parodies. When this happens, copyright holders receive no financial incentives for future creation, and potential parodists find themselves unable to get material essential to their expression. The public loses a valuable art form, and copyright fails in its mission to encourage creative expression. *Amici* therefore urge the Court to strike down the rigid application of the presumption against fair commercial uses, especially in the context of parody, by reversing the decision below.

Additionally, the First Amendment to the United States Constitution provides a separate basis for reversal of the decision below. In this case, the Respondent is using copyright to censor a critical opinion it finds offensive. Similar efforts have long been abhorred by this Court in areas such as libel, product disparagement and intentional infliction of emotional distress. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975); *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485 (1984); *Hustler*

Magazine v. Falwell, 485 U.S. 46 (1988). In those cases, the Court has responded to the challenge of censorship in two ways. First, the Court has consistently found the public's interest in a robust free marketplace of ideas superior to the state's interest in protecting individuals from expression they find distasteful. Second, the Court has protected individuals whose expression may be chilled by the possibility of censorship by extending First Amendment protection to some persons whose speech does not serve the free marketplace of ideas. This protection sends a clear signal that our government guarantees the free exercise of First Amendment rights to all those whose speech arguably serves the free marketplace of ideas, thereby reducing the chill created by the possibility of censorship. *Amici* firmly believe that the same result should be reached in this case.

ARGUMENT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE FAIR USE DOCTRINE IS INCONSISTENT WITH BASIC COPYRIGHT POLICY AND THE PUBLIC INTEREST.

A. The Sixth Circuit's presumption against the fair use treatment of commercial uses is inconsistent with the copyright code, the relevant legislative history, and past precedent established by this Court.

As a matter of copyright law, the outcome of this case is controlled by the fair use doctrine, which has been codified as section 107 of the copyright code.

17 U.S.C.A. §107 (1992), *amended by* PL-102-492 (1992). Section 107 requires the Court to consider four factors in resolving questions of fair use.[4] With respect to these instructions, both the Sixth Circuit and the Middle District of Tennessee considered all four factors. The Sixth Circuit's reversal of the district court, however, rests primarily on a difference over how to apply the first and fourth factors to the facts of this case.[5]

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[4]Section 107 states in pertinent part:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

[5]As to the second factor, both courts correctly concluded that the nature of the copyrighted work suggested a finding against fair use. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1155-56 (M.D. Tenn. 1991); *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992). As to the third factor, the Middle District of Tennessee found that it clearly signalled a finding of fair use, while the Sixth Circuit concluded that it was neutral as to fair use. 754 F. Supp. 1156-1157; 972 F.2d 1437-38. While *amici* disagree with the Sixth Circuit's conclusion on the third factor, we have decided not to address it in this brief for three reasons. First, we do not believe that Sixth Circuit's error in interpreting the third factor played a major factor in its decision to reverse the District Court. Second, we believe that cases such as *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) and *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) have clearly settled the proper interpretation of that factor. Third, we believe Judge Wiseman's opinion for the Middle District of Tennessee already draws this Court's attention to the proper analysis for the instant case. Accordingly, *amici* shall concentrate on the construction of the first and fourth factors of the fair use analysis.

According to the Sixth Circuit, the commercial nature of Petitioners' parody creates a practically conclusive presumption against fair use. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (1993) ("Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair."); 972 F.2d 1438 ("In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists.").

The source of the Sixth Circuit's presumption is clear. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), this Court wrote - albeit in dicta - that "every commercial use of copyrighted material is presumptively an unfair exploitation [of copyrighted material]." 464 U.S. 417, 451 (1984). Taken literally, this statement does support the Sixth Circuit's analysis. However, this analysis cannot possibly be correct.

First, many commercial uses are obviously fair. Criticism, comment and news reports are often sold to their readers, yet section 107 of the copyright code lists them as likely examples of fair use. 17 U.S.C.A. §107 (1992). Biographers and historians certainly write for profit. Nevertheless, it is still a fair

use when they quote or paraphrase from published writings about their subjects. *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 890 (1967); *New Era Publications International, ApS, v. Carol Publishing Group*, 904 F.2d 152 (2d Cir. 1990), *cert. denied*, 498 U.S. 921 (1990). If the Sixth Circuit's analysis were to be adopted by this Court, all of these uses would become presumptively unfair.

Second, Congress has clearly stated that while commercial use affects any fair use analysis, it is simply one of many factors which are important. Section 107 of the copyright code provides that courts should consider "the purpose and character of the use, *including* whether such use is of a commercial nature..." 17 U.S.C.A. §107(1) (1992) (emphasis added); *see also* H.R. Rep. 94-1476, 2d Sess. 66, *reprinted in* U.S. Code Cong. & Admin. News, 5659, 5679 ("the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions").

Finally, although this Court has quoted the *Sony* dictum with approval, it has been careful to avoid the very analysis endorsed by the Sixth Circuit. For example, in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), the Court examined a news report which quoted several passages from Gerald Ford's as yet unpublished memoirs. The *Harper & Row* Court could have denied fair use treatment simply because the defendant quoted the plaintiff's work for commercial purposes. However, the Court also considered the fact that the defendant's use was a news report, the defendants'

attempt to "scoop" its competition, and the peculiar timing of the defendants' publication. In doing so, the Court stated that the commercial nature of a use is "a *separate* factor that *tends* to weigh against a finding of fair use." 471 U.S. at 562 (emphasis added).

B. Commercial parodies are excellent candidates for fair use treatment.

The foregoing shows that a denial of fair use cannot begin with a blunt presumption against fair commercial use. Instead, a defendant's commercial purpose must be considered along with other factors such as the character of his use. Sometimes this character establishes that a denial of fair use cannot serve copyright policy. When this happens, a court should lean towards a finding of fair use despite a defendant's commercial motives. Commercial parodies exemplify this phenomenon.

The analysis supporting this assertion starts with the policy behind the fair use doctrine.[6] Copyright encourages creative activity for the benefit of the public by giving authors a fair return on their labor. Of course, the granting of these benefits is not without its costs, for new authors must borrow from existing materials to create new works. If copyright outlawed all borrowing, the creative process would surely grind to a halt, thereby depriving the public of the very benefits copyright should secure. Copyright therefore limits the extent to which copyright holders can prevent others from using copyrighted works. The fair use doctrine is one of the provisions which

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[6]For a fuller discussion of the issues presented here, see Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79 (1991).

accomplishes this task. It does so by considering whether the free use of copyrighted material would serve the public better than the usual maintenance of an author's copyright rights.

To see how the commercial purpose of a use sometimes tips this analysis against fair use, consider the commercial production of movies from books. In this scenario, the commercial nature of the use suggests that the movie producer will have ample funds which could be offered to a copyright holder. Additionally, the copyright holder will probably be anxious to sell these rights at a fair price, for the copyright holder will enjoy both the money and the favorable publicity which the movie will create. Indeed, the copyright holder will almost certainly cooperate with the movie maker to ensure production of the best movie possible. These observations suggest that a denial of fair use would be appropriate for three reasons.

First, a denial of fair use forces the movie maker to offer money to the copyright holder for the necessary rights. The public benefits from the increased creativity stimulated by this financial reward. Second, the author's willingness to sell means that the proposed movie will probably be made. Denial of fair use therefore will not cost the public the benefits of the proposed use. Third, the author's self interest motivates him to serve the public interest by ensuring production of a good movie.

For purposes of contrast, consider next a very different commercial use - a critical, unflattering book review which reproduces a portion of the

copyrighted text under review. Initially, it might appear that the commercial nature of the review would again cut against fair use, for commercial book reviewers do raise money which could be offered to copyright holders. Copyright holders, however, will not deal with unflattering book reviewers in the same manner as movie producers.

As noted earlier, copyright holders are generally pleased to sell movie rights. By comparison, copyright holders are much less likely to sell the necessary rights to critical reviewers. Although the sale of these rights would raise money, the copyright holder will likely refuse the money because the review, unlike the movie, will create negative publicity. Since authors (like most people) value their reputation more than money, they would simply prefer to forego money in exchange for the comfort of knowing that no one will criticize them or their work.[7]

The hostile book review scenario provides an excellent example of a case in which the character of a proposed use is more important than its commercial nature. Here, the unflattering character of the proposed use keeps the copyright holder from selling the necessary rights. Accordingly, the denial of fair use rights to hostile book reviewers fails to serve - and even harms - the public interest. First, the copyright holder's refusal to sell means that he will

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[7] Empirical evidence of this proposition is provided by Professors Bezanson, Soloski & Cranberg in their book *Libel Law and the Press* (1987). In that work, they present survey evidence in which individuals whose reputation has been damaged by libel stated that they did not consider money an adequate remedy for their losses.

realize no financial revenue. Thus, the public will gain nothing in the increased production of new works. Second, the reviewer's inability to buy the necessary rights means that the public will also be deprived of the reviewer's views. Third, if an author were for some reason inclined to sell rights to a hostile reviewer, he would not likely sell those rights unconditionally. Instead, the author would probably condition the sale on some curtailment of reviewer's criticism. In short, the author's self interest leads him to hamper, and not assist, the proposed use.

The foregoing creates an analysis which determines whether commercial parodies are good candidates for fair use treatment. If copyright holders are anxious to sell the necessary rights to parodists, the analysis tips against fair use because a denial protects the financial incentives provided by copyright. However, if copyright holders are not anxious to sell because they fear criticism or negative publicity, the analysis should tip in favor of fair use. When one considers the particular character of commercial parody, an inclination towards fair use becomes clear.

As both the district court and the Sixth Circuit note, parody is an art form which mimics an existing work for a specific purpose - the humorous criticism and ridicule of society and the parodied work. 754 F. Supp. 1154 n.2; 952 F.2d 1435-36 n.8. Although humor and criticism are expressed in ways other than parody, parody is a particularly valuable method of expressing these views because parody's unique combination of criticism and humor creates a

pungent expression of opinion which the public is likely to remember for a long time.[8]

Parody's unique and powerful brand of criticism plays an important role in deciding whether to favor the fair use treatment of commercial parodies. If these works are denied fair use treatment, parodists, like movie producers, will try to buy the necessary rights from copyright holders. However, unlike movie producers, parodists will not generally be successful.

As noted earlier, the author whose book is adapted for a movie gains both money and favorable publicity. Authors therefore are happy to sell movie rights, and they cooperate in creating the best movie possible. By contrast, since parodies subject existing works to criticism, copyright holders have little interest in having others (or themselves) parody their work. *See Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) ("Self esteem is seldom strong enough to permit the granting of permission [to a parodist] even in exchange for a reasonable fee."). Furthermore, if parody rights ever were sold, the authors in question will try to sell them only to the "worst" parodists -

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[8]The long and venerated history of parody demonstrates its value. Authors such as Aristophanes, Chaucer, Shakespeare, Swift, Pope, Fielding, Twain and Thurber all wrote important works which are parodies. For discussions about parody as an art form, see *Parodies: An Anthology from Chaucer to Beerbohm-and After* 557-69 (D. Macdonald ed. 1960), and Goetsch, *Parody as Free Speech-The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3. W. New. Eng. L. Rev. 39, 39-42 (1980).

those whose critical bite is either nonexistent or ineffective.[9]

These observations demonstrate that commercial parodies are excellent candidates for fair use treatment. Without fair use treatment for parodies, the public interest will be severely harmed. First, the public will gain nothing in future production from copyright holders, because their refusal to sell parody rights means they are not reaping the financial incentives provided by copyright. Second, very few parodies will be made, and the public will lose a valuable art form. Third, copyright holders will try to ensure that the parodies which are made will be of inferior quality.

C. The Sixth Circuit should have found Petitioners' commercial parody to be a fair use.

The importance of fair use treatment for commercial parodies sets the stage for determining the proper outcome of this case. As to the first factor of the fair use test, resolution in favor of Petitioners now depends on whether the Petitioners' particular work fits within the definition of parody as a humorous and critical form of art. The Petitioners' work clearly meets this test.

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[9]Perhaps the best expression of this sentiment is the statement by the attorney for the copyright holder in *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court sub. nom. Columbia Broadcasting Sys. v. Loew's , Inc.*, 356 U.S. 43 (1958), an early parody/fair use case: "[W]e are not against laughter - at least so long as the laugh is not at our expense." reported in Schooner, *Obscene Parody*, J. Arts Mgmt. & L., Fall 1984, at 91 n. 158.

First, Petitioners have substituted their humorous lyrics for those of the original. Second, Petitioners have substituted their irreverent, somewhat shocking rap style for the familiar, carefree style of the original. Third, Petitioners have combined a series of increasingly unflattering images with a humorous, progressive distortion of the Respondent's song. Together, these techniques create a genuine parody in which the "pretty woman" becomes foolish and then repulsive.[10] The Petitioners' message is quite clear. For them, the original song "Oh, Pretty Woman" is not the expression of healthy, innocent longing. Instead, the song represents an experience which is banal, laughable, and even disgusting.[11] Surely this is humorous criticism of the most unflattering sort.[12]

With respect to the second factor of the fair use test, *amici* agree with the Sixth Circuit's conclusion that the second factor weighs in favor of Respondent.

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[10]The woman in the Petitioners' song is first "pretty," then "hairy," then a prostitute, and finally pregnant by the singer's friend.

[11]*Amici* note that the district court's analysis and conclusion are essentially the same as that presented here. 1150 F. Supp. 1155 ("[petitioners'] song derisively demonstrates how bland and banal the Orbison song seems to them."). Furthermore, the Sixth Circuit accepted the district court's conclusion that the Petitioners' use was a valid parody, albeit reluctantly. 754 F.2d 1435.

[12]Respondent may claim that Petitioners' parody cannot be characterized as such because it criticizes society, and not the Respondent's work. The implausibility of such an argument is demonstrated by the Respondent's claim that the Petitioners' work "disparaged" and "sullied" the Respondent's work. Plaintiff's Complaint, Appendix C to Petition for Certiorari 60a-61a; 754 F. Supp. 1155 n. 4. If this argument is true, then Petitioners' work must be critical of Respondent's work.

As to the third factor, *amici* accept for purposes of argument the Sixth Circuit's conclusion that this factor is neutral.[13]

Finally, *amici* believe that the fourth factor of the fair use test tilts strongly in favor of Petitioners. As this brief has shown, derivative works such as movies from books and parodies negatively affect the market for and value of the original in two different ways. First, the derivative works may represent uses the author wants to exploit himself. In this situation, it can make sense to resolve the fourth factor against fair use in order to protect the monetary incentives copyright rightly gives to the author. Second, the derivative work may negatively affect the value of the work by ridiculing or criticizing it. In this situation, it does not make sense to resolve the fourth factor against fair use because protecting authors from criticism will not make them more creative, and it will certainly cost the public valuable critical opinions.[14]

When one studies the opinion below, it is quite clear that the Sixth Circuit assumed that this case is one in which the Respondent copyright holder has a genuine interest in exploiting the market for parodies. Indeed, the Sixth Circuit analogized this case to the making of movies from books. 972 F.2d

[13]Although we consider the district court's analysis of this factor superior to the Sixth Circuit's, we believe that there is no need to reargue the points made by the district court, as those points are already before this Court.

[14]In one of the classic works on copyright law, Benjamin Kaplan expressed this outcome in following manner: "[W]e must accept the harsh truth that parody may quite legitimately aim at garroting the original." B. Kaplan, *An Unhurried View of Copyright* at 69 (1967).

1429 ("[A] movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights."). However, careful examination of the facts reveals the grave error of this assumption, for it is abundantly clear that Respondents have absolutely no interest in exploiting the market for parodies and are trying to use copyright to prevent the Petitioners from ridiculing their work.

The most telling evidence of this is the fact that Petitioners actually asked the Respondent for permission to parody the Respondent's song. If the Respondent had been interested in exploiting the market for parodies, one would expect the Respondent to negotiate over the price to be charged for permission. Of course, Respondent did no such thing. Instead of showing interest in a use it hoped to exploit, Respondent simply denied permission for parody outright and filed a lawsuit in which it argued that the Petitioners' work "disparage[d]" and "dirtied" the song's copyright. Plaintiff's Complaint, Appendix C to Petition for Certiorari 60a-61a; 754 F. Supp. 1155 n. 4. This is exactly what one would expect from an indignant copyright holder who is interested not in exploiting copyright rights, but in using copyright to protect itself and its work from legitimate criticism.[15]

[15]Respondent may contend that a copyright holder's ability to guard against a critical parody preserves the value of its work, and that this is a legitimate use of copyright. This position is absurd. First, authors have always published under the risk that they and their work might be criticized. To claim that copyright - or any other law - allows authors to sue their critics is to claim that those who write get to control what others say about them. Indeed, if Respondent's claim is true, then authors should be

The foregoing discussion reveals that the four fair use factors come out in the following pattern. Two factors, the first and the fourth, weigh in favor of the Petitioners. One factor, the second, weighs in favor of the Respondent. One factor, the third, is neutral. When one also considers the fact that the fourth factor, "undoubtedly the single most important element of fair use,"[16] weighs strongly in Petitioners' favor, the only conclusion that can be reached is one granting fair use protection to the Petitioners' parody. For this reason, the Sixth Circuit's decision below should be reversed.

II. THE FIRST AMENDMENT REQUIRES A REVERSAL OF THE DECISION BELOW.

A. This Court should recognize clear First Amendment limits to the reach of copyright law.

First Amendment issues are implicit in every copyright case. As an initial matter, Article I of the Constitution authorizes the passage of copyright legislation, and the First Amendment limits the powers granted by Article I. Additionally, copyright is the legal descendant of censorship,[17] something the First Amendment abhors. Finally, the creation of new works necessarily requires some borrowing from

able to sue critical book reviewers. Second, the First Amendment prohibits the censorship that this position implies. *Amici* address this point further in part IIB of this argument.

[16]*Harper & Row*, 471 U.S. at 566.

[17]See Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L. J. 517, 524-25 (1990).

existing ones. Copyright's prohibition against borrowing therefore implies some restriction on free speech.[18]

Despite these observations, however, courts uniformly reject First Amendment defenses to copyright claims.[19] Although copyright does prevent some people from expressing themselves as they please, copyright encourages others to express themselves through its financial incentives. Also, to the extent that copyright's prohibition against borrowing becomes too burdensome, doctrines like the idea/expression dichotomy and fair use act as safety valves, thereby ensuring copyright's ability to encourage more speech than it restricts. Indeed, some courts have gone so far as to assert that the First Amendment is irrelevant to copyright law.[20]

[18]For three recent articles discussing the conflict between copyright and the First Amendment, see Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 Wm. & Mary L. Rev. 665 (1992); Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 Emory L. J. 393 (1989); Patterson, *Free Speech, Copyright and Fair Use*, 40 Vand. L. Rev. 1 (1987).

[19]*See, e.g., McGraw-Hill v. Worth Publishers, Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971) ("Defendants First Amendment argument can be dismissed as flying in the face of established law."); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) ("defendant's [First Amendment] claim can be dismissed without a lengthy discussion..."); *Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187-88 (5th Cir. 1979)

[20]Examples of this include *New Era Publications Intern. v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) ("the fair use doctrine encompasses all claims of first amendment in the copyright field...") and *Schnapper v. Foley*, 471 F. Supp. 426, 428 (D.D.C. 1979), *aff'd*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) ("[I]t is

This extreme position is gravely mistaken. Even if copyright encourages more expression than it restricts, it does not necessarily follow that all plausible constructions of copyright law are consistent with the First Amendment. This is because courts have not limited copyright to the protection of financial opportunities that copyright holders would like to exploit. Instead, courts have suggested that copyright holders may sue to protect their privacy, reputation or sensibilities.[21] This in turn has led to cases in which plaintiffs use copyright simply to suppress the expression of views they find distasteful or offensive.[22] All of these cases raise serious First Amendment issues which require special attention.

First, copyright no longer encourages more speech than it restricts when a plaintiff uses copyright to protect his privacy, reputation or sensibilities. This is because such interests are at best remotely connected to the monetary rewards by which copyright encourages expression. Protecting these interests would therefore create measurable First

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well established that there is no conflict between the First Amendment and the copyright laws.").

[21]*See Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S, 890 (1987); *MCA v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (apparently basing decision against defendant in part on "dirty" lyrics of defendant's song entitled "Cunnilingus Champion of Company C").

[22]See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986) (plaintiff sued in copyright to interfere with political fundraising of enemy); *Maxtone-Graham v. Burtchaell*, 631 F. Supp. 1432 (S.D.N.Y. 1986), *aff'd*, 803 F.2d 1532 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987) (plaintiff, a pro-choice author, sued defendant in copyright because defendant's essay did not promote pro-choice views). See also footnote 2, *supra*.

Amendment losses without stimulating any new expression.

Second, and perhaps more important, the quality of expression will suffer as well. Many important forms of speech are recognizably derivative, and as such their vitality could depend on the consent of a copyright holder. Historians, news reporters and biographers refer to and quote from copyrightable sources. Lecturers and political parties often use copyrighted statements to illustrate their points. Each of these expressions plays a vital role in the intellectual and political traditions which the First Amendment protects. These roles would be severely compromised if the people who author these expressions could be prevented from speaking by a copyright holder who found their views distasteful. If copyright could ever be used to protect a claimant's reputation, privacy or sensibilities, the mere expense of being sued - let alone the possibility of adverse judgment - would encourage many to submit their writings to copyright holders for approval. We would wind up with a discourse in which those who happen to own copyrights control what is said by others.[23]

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[23]This concern is not a matter of idle theory. Consider the problems raised by two recent cases against biographers who are critical of L. Ron Hubbard and the Church of Scientology. In these cases, the holder of copyrights bequeathed by Hubbard to the Church of Scientology sued for injunctions against publishers of biographies which used Hubbard's copyrighted writings to make unflattering points about Hubbard and the church. Ordinarily, one might think that biographers would have broad license to make use of these materials. After all, direct quotation from original sources is one of the most accurate means of establishing certain facts. The courts, however, did not interpret the law that way.

The foregoing discussion shows that copyright does raise First Amendment issues which cannot be eliminated by the platitude that copyright encourages more speech than it eliminates. Furthermore, copyright threatens the quality of discourse by encouraging speakers to submit to censorship. Accordingly, courts should not take the view that the First Amendment may be ignored in copyright cases. *Amici* urge this Court to eliminate this dangerous practice with a clear statement of the First Amendment's relevance to copyright law.

In the first case, *New Era Publications International, ApS, v. Henry Holt and Company, Inc.*, 695 F. Supp. 1493 (1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), the district judge denied injunctive relief on two grounds. First, most of the biography's quotations were fair uses. Second, the First Amendment prohibited enjoining the dissemination of speech. 695 F. Supp. at 1523-28. The Second Circuit, however, disagreed, affirming the denial of injunctive relief, but only on the ground of laches. 873 F.2d at 577, 583-85. In the second case, *New Era Publications International, ApS, v. Carol Publishing Group, 729* F. Supp. *992 (S.D.N.Y. 1990), rev'd*, 904 F.2d 152 (2d Cir. 1990), *cert. denied*, 498 U.S. 921 (1990), the district court held that there was no fair use, but the Second Circuit disagreed, holding that there was a fair use but without overruling the result of the first case.

From the standpoint of the potential biographer, the message from the above cases is chilling. Although there is some chance of ultimately prevailing in a copyright suit brought by a disgruntled subject, there is certainly no guarantee. Indeed, there is the very real likelihood that this possible vindication will require an expensive district court proceeding and an appeal to a circuit court. The risk of suit and the expense of defense therefore give biographers a very real incentive to avoid controversy by seeking approval of their work from their subjects.

B. The Sixth Circuit's decision violates the First Amendment because it permits the censorship of unpleasant criticism.

A sound First Amendment analysis of this case begins by remembering that Respondent sued because it resented Petitioners' criticism of its copyrighted work. This interest is unrelated to the monetary incentives provided by copyright, and it shows that the Sixth Circuit's decision violates the First Amendment.

Since the Respondent's claim is unconnected to copyright's financial incentives, it is clear that the Sixth Circuit's decision cannot stimulate any new creativity to compensate for the loss of Petitioners' critical expression. This means that the usual justification for copyright's suppression of speech is absent. Moreover, Respondent's motivation for suit is clearly its desire to censor unpleasant criticism. Enforcement of Respondent's claim would therefore threaten the quality, as well as the quantity, of speech available to the public.

Of course, Respondent will likely contest the assertion that its suit constitutes censorship which is unrelated to copyright's monetary incentives. Instead, Respondent may contend that its suit protects the economic value of its copyright by preventing Petitioners' unlicensed criticism from diminishing the public's opinion of "Oh, Pretty Woman."[24] *Amici* submit that this argument only strengthens the First Amendment aspects of this case.

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[24]Respondent may also claim that it intends to market its own parody some day, and that its suit protects this market. As this brief has already shown, however, this assertion is simply false.

If there is anything that is well established in our First Amendment jurisprudence, it is the principle that speech cannot be suppressed merely because someone finds it offensive or critical. The strength of this principle is demonstrated by the wide variety of contexts in which it has been applied to vindicate free speech interests. *See, e.g., R.A.V. v. City of St. Paul*, 60 U.S.L.W. 4667 (1992); *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Street v. New York*, 394 U.S. 576 (1969). Moreover, this Court has steadfastly applied the principle to protect critical speech from the claim that it harms the criticized subject's public perception or reputation.

For example, this Court has held that "preserving the flag as a symbol of nationhood and national unity" cannot justify prosecution of those who use the flag as the platform for their unpopular views. *Texas v. Johnson*, 491 U.S. 397, 410-20 (1989). Similarly, the Court has invalidated a federal statute which permitted actors to wear military uniforms "if the portrayal does not tend to discredit that armed force." *Schact v. United States*, 398 U.S. 58 (1970). Finally, this Court has even prevented individuals from suing their critics in all but the most egregious circumstances. If the subject of criticism is a public figure or a product sold by a public figure, the criticism must be a false factual statement published with knowing or reckless disregard for the truth. Even if the subject is a private figure, the action is

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Respondent has had nearly thirty years to exploit this market, and it has not done so. *Amici* submit that the reason for this is Respondent's desire to suppress the criticism which is inherent in parodies like Petitioners'.

prohibited unless a showing of fault can be made. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964) (setting forth public figure standard); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975) (setting forth limits on actions by private figures); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (applying *New York Times* standard against action brought to protect product from criticism). Of course, since parodies seldom make statements of fact, they are fully protected by the First Amendment even if they are highly caustic and offensive to their targets. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (protecting parody under First Amendment).

The reasoning behind these decisions is quite important to the case at hand. If the free marketplace of ideas is to work, people must be given room to criticize each other. Since both sides of a dispute cannot both to be right, the First Amendment necessarily contemplates participation in the free marketplace of ideas by the uttering of criticism which others will find revolting. *Gertz*, 418 U.S. at 339-340 ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). This is especially true if the target of the criticism is a public figure or an object of public interest. *See Hustler*, 485 U.S. at 51 (noting that public figures are particularly appropriate targets of "vehement, caustic, and sometimes unpleasantly sharp attacks"). More important, if people could be sued because others found their speech offensive, many who might otherwise speak would not do so for fear of being sued by someone who disagreed. Thus, the First Amendment even protects offensive statements which are of dubious value in order to

ensure full participation in the free marketplace of ideas. *See Gertz*, 418 U.S. 340-341 (stressing the need to avoid self-censorship); *New York Times*, 376 U.S. at 279 ("Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.").

Together, the cases discussed above conclusively show the unconstitutionality of Respondent's case. First, cases like *Johnson* and *Schact* simply forbid laws which preserve the value of public symbols by preventing their use as a platform for critical expression. At heart, Respondent wants to preserve its song's image by keeping the Petitioners from using the song as the basis for criticism. This motivation is no different than the government's desire to preserve the flag as a symbol of national unity or its desire to ensure favorable portrayal of the armed forces.

Second, cases such as *New York Times, Gertz*, and *Bose* show that the free speech interests vindicated in *Johnson* and *Schact* are equally preeminent when individuals bring actions to protect their reputations or the products they sell. In this case, Respondent is a music publisher which actively promotes itself to the public and offers its song for public sale. Respondent and its song are therefore public figures who are particularly fair targets for criticism. Thus, Respondent's action cannot succeed unless Petitioners published a false statement of fact with actual knowledge or reckless disregard of the truth. Of course, since Petitioners' song makes no factual statement about Respondent or its song, this requirement cannot be satisfied.

Finally, the reasoning of cases like *New York Times, Gertz* and *Hustler* makes it vitally important to protect Petitioners even if this Court has doubts about the quality or value of their work. This is because there are many unquestionably valuable parodies whose existence is threatened by the Sixth Circuit's decision. If this Court allows Respondent to win, offended copyright holders will censor many of these parodies by bringing similar actions of their own. The public will then lose the valuable opinions and expressions that parody uniquely provides. Accordingly, it is important for this Court to protect Petitioners' parody not only for its own value, but for the value of other parodies not before the Court.[25] A First Amendment decision in favor of Petitioners is therefore clearly correct.

CONCLUSION

The key observation in this case is the fact that Respondent, Acuff-Rose Music, Inc., sued the Petitioners, Luther Campbell *et al.*, because Respondent resented the criticism inflicted by Petitioners' parody. Respondent's suit therefore represents an attempt to accomplish private censorship through copyright, and not an interest in exploiting the market for parodies of its song "Oh, Pretty Woman." Because of this fact, a decision affirming the Sixth Circuit's opinion would violate

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[25] *Hustler v. Falwell*, 485 U.S. 55 ("There is no doubt that the caricature of respondent and his mother is at best a distant cousin of the political cartoons [which contribute most to the free marketplace of ideas], and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard...").

basic copyright policy and harm the public interest, Furthermore, such a decision would take copyright beyond limits imposed by the First Amendment. For these reasons, *amici* respectfully urge this Court to reverse the decision of the Sixth Circuit and reinstate the decision of the Middle District of Tennessee.

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